Citation: ***V. R. v. Minister of Employment and Social Development,*** **2015 SSTAD 1089**

Date: September 14, 2015

File number: AD-15-442

APPEAL DIVISION

Between:

V. R.

Applicant

and

Minister of Employment and Social Development
(Formerly Minister of Human Resources and Skills Development)

Respondent

Decision by: Hazelyn Ross, Member, Appeal Division

Decided on the Record on September 14, 2015

DECISION

[1] Leave to appeal to the Appeal Division of the Social Security Tribunal of Canada is refused.

INTRODUCTION

[2] In a decision issued April 28, 2015, the General Division of the Social Security Tribunal of Canada, (the Tribunal), found that the Applicant did not meet the criteria for payment of a *Canada Pension Plan* (CPP) disability pension. The Applicant seeks leave to appeal the decision, (the Application).

GROUNDS OF THE APPLICATION

[3] The Applicant's minimum qualifying period, (MQP), ended on December 31, 2005. Counsel for the Applicant submitted that the Applicant had a severe and prolonged disability before this date. He submitted that the General Division breached subsection 58(1) of the *Department of Employment and Social Development* (DESD) *Act,* in that the General Division committed a number of errors of law and based its decision on erroneous findings of fact which it made in a perverse or capricious manner or without regard for the material before it.

ISSUE

[4] The Tribunal must decide whether the appeal has a reasonable chance of success.

THE LAW

[5] Leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division.[1] To grant leave, the Appeal Division must be satisfied that the appeal would have a reasonable chance of success[2]. In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 as well as in *Fancy v. Canada*

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[1] Sections 56 to 59 of the DESD Act. Subsections 56(1) and 58(3) govern the grant of leave to appeal, providing that "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal."

[2] The DESD Act, subsection 58(2) sets out the criteria on which leave to appeal is granted, namely, "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

(Attorney General), 2010 FCA 63, the Federal Court of Appeal equated a reasonable chance of success to an arguable case.

[6] There are only three grounds on which an appellant may bring an appeal. These grounds are set out in section 58 of the DESD Act. They are,

> (1) a breach of natural justice;
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> (2) the General Division erred in law; and
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> (3) the General Division based its decision on an error of fact made in a perverse or capricious manner or without regard for the material before it.[3]

[7] In order to grant leave to appeal the Tribunal must be satisfied that the appeal would have a reasonable chance of success. This means that the Tribunal must first find that, were the matter to proceed to a hearing (a) at least one of the grounds of the Application relate to a ground of appeal; and (b) there is a reasonable chance that the appeal would succeed on this ground. For the reasons set out below the Tribunal is not satisfied that this appeal would have a reasonable chance of success.

ANALYSIS

[8] On her behalf, Counsel for the Applicant submitted that the General Division erred in law in para. 43 of its decision by reciting the *Villani*[4] criteria but then undermining them by

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[3] **58(1) Grounds of Appeal** –

a. The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

b. The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

c. The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[4] *Villani v. Canada (Attorney General)* 2001 FCA 248

stating that not "everyone with a health problem or who has some difficulty finding and keeping a job is entitled to a disability pension."

[9] The Tribunal finds no error on the part of the General Division. First, eligibility for a CPP disability pension is the very raison d'être of the enquiry before the General Division. It stands to reason then, that not everyone would qualify for the pension. Second, there is case law support for the General Division's observation. For example, in *Gaudet v. Canada (Attorney General),* 2013 FCA 254 Stratas, J.A. reached this very conclusion. Stratas, J.A. stated:

> [5] Under subsection 42(2) of the *Plan*, an applicant for disability benefits must demonstrate, among other things, that her disability is "severe and prolonged" such that she could not pursue regularly any substantially gainful occupation by the end of her minimum qualifying period under the *Plan*, here December 2001.

[10] Stratas, J.A. went on to note that,

> [6] Many applicants for disability benefits are suffering pain and discomfort at the time of the Board's proceedings and the judicial review in this Court. Many are unsuccessful. This is no reflection on them or their condition. It is a reflection only of the difficult standard applicants must meet in order to demonstrate their disability is "severe and prolonged" within the meaning of subsection 42(2) of the *Plan*.

[11] In the Tribunal's view these statements are clear support for those of the General Division. Accordingly, the Tribunal finds that this is not a ground that would have a reasonable chance of success on appeal.

[12] Counsel for the Applicant alleged a further error of law in the General Division's statement that *Villani* requires medical evidence regarding the disability as well as evidence regarding employment efforts and possibilities. Counsel submitted that this was an error of law because the General Division was "ignoring the concept that the need for evidence regarding employment efforts and possibilities only arises where the evidence leaves open the possibility that an applicant is at least capable of some form of employment in the "real world".

[13] The Tribunal rejects this submission as being a ground of appeal that would have a reasonable chance of success. The Tribunal can find no support for the proposition that need for evidence regarding employment efforts and possibilities is dependent upon an anterior finding that an applicant is capable of some form of employment in the "real world". Not only in *Villani* itself, but in several other cases, the Federal Court of Appeal has been at pains to clarify that an applicant for CPP disability pension must provide some objective medical evidence. In *Villani,* the Federal Court of Appeal set out the requirement that "medical evidence will still be needed as will evidence of employment efforts and possibilities. The Federal Court of Appeal was clear that the evidence was required in order to assess whether or not an applicant for a CPP disability pension came within the definition of paragraph 42(2)(a). Thus, in *Warren v. Canada,* 2008 FCA 377, Decary, J.A, observed:

> In the case at bar, the Board made no error in law in requiring objective medical evidence of the applicant's disability. It is well established that an applicant must provide some objective medical evidence (see section 68 of the *Canada Pension Plan Regulations*, C.R.C., c. 385, and *Inclima v. Canada (Attorney General)*, 2003 FCA 117; *Klabouch v. Minister of Social Development*, 2008 FCA 33; *Canada (Minister of Human Resources Development) v. Angheloni*, [2003] F.C.J. No. 473 (QL)).

[14] Accordingly, the Tribunal is not satisfied that this is a ground of appeal that could have a reasonable chance of success. Leave cannot be granted on this basis.

[15] Counsel for the Applicant made additional submissions respecting the conclusions the General Division reached about the medical evidence. He submitted that it was an error of law for the General Division to conclude that there was no evidence to support that the Applicant suffered from depression or anxiety prior to the end of the MQP. Counsel submitted that the General Division ignored the evidence showing that three doctors had recommended/prescribed tricyclic [antidepressant] medication. Counsel for the Applicant made the further submission that the General Division erred in law by asking the wrong question regarding tricyclic medication and made a further error of law by giving insufficient weight to the medical opinions of Drs. Sharma and Richards.

[16] The Tribunal is not persuaded by Counsel's submissions. While Counsel relies on the evidence that three doctors recommended or prescribed tricyclic medicine for the Applicant, the Tribunal is not persuaded that these recommendations were in regard to depression or anxiety. The Tribunal reaches this conclusion because in the reports of the physicians in question, it is not clear that a tricyclic medication was prescribed for anything other than pain. For example, in his report dated June 8, 2004, Dr. Jeffrey Trott, a neurologist, states that the Applicant "has seen Dr. Sawa in the past and he has suggested introduction of a tricyclic agent. I am uncertain if this suggestion was followed so I have initiated nortriptyline therapy at 25 mg. nightly." Dr. Trott does not refer either to depression or anxiety in his report. GT1-51-52.

[17] Dr. Sawa to whom, Dr. Trott refers in his report, commissioned an MRI of the Applicant's brain. Dr. Trott noted that he explained to the Applicant that the MRI would be an opportunity to "image the balance centres in her brain in order to rule out organic pathology." GT1-52

[18] In a report dated January 16, 2006, Dr. Michael Lang, a physiatrist, discussed the Applicant's chronic pain syndrome. The report contains no discussion of depression or anxiety. GT1-59. Dr. Lang does state that he wished to prescribe a tricyclic, however, there is no indication that he was prescribing such as a means of addressing either depression or anxiety. Dr. Lang stated that he wanted to wean the Applicant off of codeine and on to regular Tylenol. GT1-59 He goes to state that in his view the Applicant would benefit from a tricyclic at night, expressing his opinion in the following terms:

> I think she would also benefit from a tricyclic at night and I am not sure if she ever tried Dr. Trott's suggestion of Nortriptyline. She should begin at a low dose of 10 mg. and gradually increase. If she has tried this and failed, then she might benefit from taking some other sedative at night such as Trazodone or Imovane. GT1-59.

[19] The Tribunal infers from the fact that Dr. Lang linked Nortriptyline to the taking of a sedative at night that, it is reasonable to infer that this was the purpose for which the Applicant had been prescribed tricyclic medications. The Tribunal also concluded that given the absence of any mention of depression and anxiety in the reports of the relevant doctors, on a balance of

probability, in the Applicant's case, the tricyclic medications were not intended to treat depression or anxiety. Accordingly, the Tribunal finds that the General Division had not reached its conclusion in the face of "evidence that three doctors had recommended/prescribed tricyclic [antidepressant] medication." The Tribunal is satisfied that this is not a ground of appeal that would have a reasonable chance of success.

[20] In light of the Tribunal's finding concerning the prescribing of tricyclic medications, the Tribunal is not satisfied that whether the General Division asked the wrong question regarding tricyclic medication is a ground of appeal that would have a reasonable chance of success.

[21] With regard to the submission that the General Division erred in law by giving insufficient weigh to the medical opinions of Drs. Sharma and Richards, the Tribunal finds that, in the case of Dr. Sharma, the General Division did not err. As the General Division Member notes, Dr. Sharma's report was prepared some six years after the end of the MQP period. The Report is dated October 10, 2011. While Dr. Sharma's prognosis for recovery was poor and while he concluded that the Applicant was unemployable, his report was prepared long after December 31, 2005. GT1-45-48

[22] In *Orozco*[5] the Pension Appeals Board held that the fact that a diagnosis was not made until after the applicant's MQP was not fatal to the claim if the condition is causally connected to the MQP time frame. The General Division Member noted that Dr. Sharma offered no opinion on the Applicant's physical or mental condition that they obtained on or before December 31, 2005. Thus, the General Division did not have the ability to reach an informed conclusion about whether the Applicant met the CPP requirements on or before December 31, 2005. Therefore, there was no error on the part of the General Division.

[23] With respect to the medical opinion of Dr. Richards. Dr. Robin Richards diagnosed the Applicant as having a "significant and severe permanent disability consisting of pain, weakness, loss of the terminal range of motion, lack of endurance and inability to return to her pre-injury level of activity. Dr. Richards went on to find that the Applicant was disabled for her previous occupation and that her competitive position in the workplace had been negatively impacted by her injury. Like Dr. Sharma's report, Dr. Richards' report was also prepared post-MQP, albeit

[5] *Orozco v. MHRD,* (July 2, 1997),

at a date closer in time to the MQP. However, the General Division found that Dr. Richard's report did not support a conclusion that the Applicant was disabled from all work.

[24] The Tribunal finds that the General Division decision in respect of the opinions of Dr. Sharma and Dr. Richards, is, in all the circumstances of the case, per *Dunsmuir*,[6] reasonable in that it demonstrates the "existence of justification, transparency and intelligibility within the decision-making process" and, further, "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law." Accordingly, the Tribunal is not satisfied that the submission that the General Division erred in law by giving insufficient weigh to the medical opinions of Drs. Sharma and Richards gives rise to a ground of appeal that would have a reasonable chance of success.

[25] Counsel for the Applicant also posited that the General Division erred in law by "ignoring the Canada Pension Plan Adjudication Framework at p. 18 'Considering All the Evidence' which sets out a specific adjudicative approach for cases involving Chronic Pain Syndrome." With respect, the Tribunal is not persuaded by this argument. The Tribunal is a body independent of the Respondent. As an independent body, this Tribunal is not persuaded that the CPP Adjudication Framework, which is a document prepared for and intended to guide the decision-making process of the Respondent's employees, could have significant suasion on any General Division decision.

Did the General Division base its decision on erroneous findings of fact?

[26] Counsel for the Applicant submitted that at paragraphs 49 and 50 of the decision, the General Division based its decision on erroneous findings of fact that it made in a perverse or capricious manner, namely that the General Division rejected the Applicant's explanation for her failure to look for suitable employment.

[27] The Applicant's explanation had been that she knew she could not return to work or participate in retraining because she could not function at home and had limited ability to go grocery shopping. The General Division found this was not a reasonable explanation. The Tribunal is not persuaded that the General Division conclusion demonstrates error of any kind.

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[6] *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9.

Mitigation in the form of a search for alternative employment is an important component of the determination of whether an applicant meets the definition of severe and prolonged disability. The Federal Court of Appeal has delineated this principle in cases such as *Canada (Attorney General) v. Fink*, 2006 FCA 354, stating,

> to support a claim, disability must normally be demonstrated on more than the claimant's evidence that he or she suffers pain or discomfort that prevents employment. Once evidence of employability is established, evidence that the claimant made efforts to obtain and maintain employment but failed by reason of a serious health condition is usually also required.

[28] Previously, in *Inclima*[7], the Federal Court of Appeal made the following determination:

> [2] Subsection 42(2) of *Canada Pension Plan*, *supra*, says that a person is severely disabled if that person "is incapable regularly of pursuing any substantially gainful occupation". In *Villani v Canada* [2002] 1 F.C. 130 at paragraph 38, this court indicated that severe disability rendered an applicant incapable of pursuing with consistent frequency any truly remunerative employment.
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> [3] This was put into context in paragraph 50 of the same decision where the following appears:
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> This restatement of the approach to the definition of disability does not mean that everyone with a health problem who has some difficulty finding and keeping a job is entitled to a disability pension. Claimants still must be able to demonstrate that they suffer from a "serious and prolonged disability" that renders them "incapable regularly of pursuing any substantially gainful occupation". Medical evidence will still be needed *as will evidence of employment efforts and possibilities.* (emphasis added)
>
> [4] Consequently, an applicant who seeks to bring himself within the definition of severe disability must not only show that he (or she) has a serious health problem but where, as here, there is evidence of work capacity, must also show that efforts at obtaining and maintaining employment have been unsuccessful by reason of that health condition.

[7] *Inclima v. Canada (Attorney General)*, 2003 FCA 117.

[29] It is for the General Division to assess the evidence of severe disability. In the Applicant's case, the General Division concluded that the medical evidence did not point to a severe disability. Thus, it was not unreasonable for the General Division to conclude that an inability to do household chores and to go grocery shopping were not "a reasonable explanation for the Applicant's failure to look for alternative suitable employment". The Tribunal is not satisfied that this submission could give rise to a ground of appeal that would have a reasonable chance of success.

[30] Similarly, the Tribunal finds no contradiction in the General Division's finding that the Applicant delaying applying for CPP disability benefits because she had hoped to be able to return to the work was contradictory with not attempting to return to work. In the Tribunal's view, it is reasonable to expect that an applicant who hopes to be able to return to the work force would take active steps to do so, which the Applicant did not do. Thus, the Tribunal is not satisfied that this submission could give rise to a ground of appeal that would have a reasonable chance of success.

[31] Lastly, Counsel for the Applicant submitted that, at paragraph 51 of the decision, the General Division erred in law in para. 51 in its application of the *Villani* factors to the facts in this case by finding that:

- the appellant's employment history was "strong and varied"
- the appellant gained experience working with the public through her inventory clerk job

[32] The Tribunal finds that the submissions are not supported. It was the Applicant's evidence that she worked at several jobs prior to stopping work. These included on an assembly line in a meat plant; and on the assembly line at Inglis appliances. As well, the Applicant testified that she worked as an inventory control clerk at Sears and while assisting the public was not the primary function of her job, it was the Applicant's evidence that she did assist the public i.e. customers when they required assistance.

[33] In light of the Applicant's evidence the Tribunal is hard-pressed to find where the General Division erred. Accordingly, the Tribunal is not satisfied that this is a ground of appeal that would have a reasonable chance of success.

CONCLUSION

[34] Counsel for the Applicant submitted that the General Division made a number of errors of law and fact in its decision. In Counsel's submission had the General Division not made these errors the Member would have found that the Applicant suffers from a severe and prolonged disability as defined by paragraph 42(2)(a) of the CPP. For the reasons set out above the Tribunal is not satisfied that Counsel's submissions disclose a ground of appeal that would have a reasonable chance of success. Accordingly, the Application is refused.

Hazelyn Ross
Member, Appeal Division